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ABSTRACT

Public concern about use of drugs by young people in the United States remains high and efforts to counter drug abuse through education and intervention continue. While drug testing of athletes at the collegiate level is fairly common, legal restraints make testing less common at the secondary school level. After citing numerous statistics regarding the extent of drug use by young people, this article explores constitutional aspects of drug testing in the public school, testing techniques and procedures, and implications of several major Supreme Court decisions. Criteria for upholding suspicionless searches which lower courts have drawn from these decisions are discussed in detail. These criteria are: (1) Compelling Need; (2) Limited Scope/Achievable Goals; (3) Less Intrusive Alternatives; (4) Diminished Expectations of Privacy; (5) Limitations on Officials' Discretion; and (6) The Result of Positive Test Findings. Finally, a 1994 Supreme Court decision is reviewed in which it was ruled that drug testing programs that can be justified as needed to meet a specific, localized drug use problem are constitutional. Contains 20 endnotes. (RB)

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A LEGAL MEMORANDUM

September 1995 ISSN 0192-6152

DRUG TESTING IN PUBLIC SCHOOLS

by Eugene C. Bjorklun

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A Legal Memorandum

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Drug Testing in Public Schools

Drug use in the United States has been a serious concern for many years. Several studies have documented its prevalence and effects. Thompson and Shoop, for example, report that 15–20 million Americans are addicted to alcohol, 20 million use marijuana, 5 million regularly use cocaine, and one-half million are heroin addicts. Rehabilitation costs range from $4,000 to $160,000 per addict, and the estimated annual loss to the economy from drug use is between 26 and 60 billion dollars.[1]

The use of drugs among young people is also a serious concern. Getting an accurate picture of drug use among young people is difficult because there is no way to know how much of particular drugs are sold because most of them are illegal and there is no accurate way to count drug users. Most of the data come from surveys employing self-report questionnaires whose validity is limited by the assumption that the respondents have reported honest and accurate information.[2]

One of the more comprehensive surveys is that conducted by the National Institute on Drug Abuse. Data are obtained from more than 30,000 randomly selected individuals in a sample of households across the nation. The 1990 survey found that approximately 23 percent of youth between the ages of 12 and 17 reported that they had used one or more illicit drugs at some time in their lives and 48 percent had used alcohol.[3] For young adults between 18 and 25, 56 percent had used illicit drugs and 88 percent had used alcohol in their lifetimes. In regard to current use 8 percent (1.6 million) of youth 12–17 reported illicit drug use within the past month and 24 percent (4.8 million) had used alcohol. For young adults 18–25, 15 percent (4.3 million) had used illicit drugs and 63 percent (18.1 million) had used alcohol within the past month.

National Institute data also indicate a general decrease in the use of illicit drugs and alcohol from the late 1970s when it was highest. For example, in 1979 more than 70 percent of youth 12–17 reported alcohol use and about 35 percent reported illicit drug use in their lifetimes. By 1990, those percentages had fallen to 48 percent and 23 percent respectively for that age group. Other studies, however, indicate that there has been no decline in drug use. The Parents Resource Institute for Drug Education surveyed more than 200,000 students in 34 states in 1992 about their use of alcohol, tobacco, and other drugs and found that drug use had risen in all categories except wine coolers, marijuana, and cocaine over the usage reported in 1991 by a similar survey.[4]

A more recent survey by the Institute for Social Research at the University of Michigan found that the use of illegal drugs by teenagers has risen during the past few years. Data from 52,000 students from 420 public and private secondary schools indicated that 35 percent of eighth graders, almost 43 percent of tenth graders, and almost 50 percent of twelfth graders have used illegal drugs, all of which are increases from previous years. The increase in marijuana use was the most evident. Among eighth graders, 13 percent indicated they had smoked marijuana in the past year (1994), double the percentage in 1991. The percentage of tenth graders who smoked marijuana in 1994 rose to 25 percent, up from 16 percent in 1991. For twelfth graders the percentage increased from 24 in 1991 to 31 in 1994. The study concluded that drug use by young people " … is a problem which is getting worse at a fairly rapid pace."[5]

Much of the concern about drug use by young people focuses on performance enhancing drugs, specifically anabolic steroids. The extent of such use is substantial and apparently growing. Buckley, et al., surveyed more than 3,400 male twelfth grade students in 46 public and private high schools in 1988 and found that 6.6 percent use or have used anabolic steroids. The researchers concluded that " … if the AS use rate from our self-selected sample is applied to the national population of males enrolled in secondary schools, it suggests that between 250,000 and 500,000 adolescents in the country have used or are currently using these drugs."[6]

Recent studies reported by the Health and Human Services Department indicate that more than 250,000 adolescents have used steroids. The number is growing. The HHS Inspector General's office concluded that about 262,000 high school students, or about 3 percent of all students, have used steroids. The vast majority of the users are male and virtually all current or former users were in a competitive sport or weight-training program at the time they started using steroids.[7]

One of the methods to attempt to curb drug use that has received considerable visibility is testing. The use of tests to detect performance enhancing drugs in participants in the Olympics and other international competitions has been widely publicized. Similarly, the National Collegiate Athletic Association drug testing program adopted in 1986 for athletes at all post-season championship events and football bowl games and expanded in 1990 on a year round basis for colleges and universities that participate in Division I-A and I-AA football competition has received considerable publicity.

Less well-publicized, perhaps, have been the efforts to curb drug use at the secondary school level through drug testing programs. According to a 1986 survey by the National Federation of State High School Associations, at least 16 high schools in 11 states had some form of drug testing program, mostly for student athletes.[8] More recently, schools in Illinois, Michigan, Indiana, and Arizona were reported to have instituted drug testing programs for student athletes as a way to curb steroids use, which some authorities claim has reached epidemic proportions.[9] Drug testing programs thus are in place in secondary schools across the nation and their legality has been challenged by students.

DRUG TESTING AND THE FOURTH AMENDMENT

While there may be some due process concerns about the legality of drug testing programs, based on the Fourteenth Amendment, most objections have been based upon the Fourth Amendment's protection against unreasonable searches and seizures. The earliest cases that dealt with the legality of drug tests under the Fourth Amendment grew out of the NCAA's drug testing requirements in the mid-1980s and involved college students. A primary question in those cases was whether or not the NCAA was a state actor since the federal Constitution only protects individual rights from infringement by state action. In 1988, the Supreme Court ruled in *NCAA* v. *Tarkanian* that the NCAA is a private party.[10] Thus, most of the college student challenges were brought in state courts on the basis that the required drug tests violated state constitutions and statutes.[11]

Challenges to drug testing programs in public secondary schools, however, raise no similar question. Public school boards are clearly state actors to whose policies the Fourth Amendment applies. The issue then becomes: Does a drug testing program constitute a search? In 1989, the Supreme Court ruled in two cases, *Skinner* v. *Railway Labor Executives Ass'n.* and *National Treasury Employees Union* v. *Von Raab,* that drug tests involving the collection and analysis of a sample of urine are searches under the Fourth Amendment.[12] As the Court stated in *Skinner:* "Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, ... these intrusions must be deemed searches under the Fourth Amendment."

Both *Skinner* and *Von Raab* involved drug tests in employment situations, but their principles have been extended to public school situations involving students.[13] Since such tests are searches, the guidelines for searches of students established by the Supreme Court in 1985 in *New Jersey* v. *T.L.O.* become important to consider. In *T.L.O.* the Court held that school officials do not need to obtain a warrant to search students because of the special protective role the school has with regard to students. Instead, school officials may search students without a warrant if the search is based upon a *reasonable suspicion* that it will discover evidence of violation of either school rules or the law.[14] Under ordinary circumstances this means a search of a student must be based on individualized suspicion that evidence of wrongdoing will be discovered. But, is individualized suspicion required under other than "ordinary" circumstances?

In footnote number 8 in its *T.L.O.* decision, the Court stated: "Although some quantum of individualized suspicion is usually a prerequisite to a constitutional search and seizure, the Fourth Amendment imposes no irreducible requirement of such suspicion."[15] In *Skinner* and *Von Raab,* the Court upheld searches not based upon individualized suspicion. The court ruled in *Skinner* that the privacy interests of railway employees were outweighed by the government's special need to ensure travelers' safety. In *Von Raab,* the Court stated: "In certain limited circumstances, the Government's need to discover ... is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion."

DRUG TESTING TECHNIQUES AND PROCEDURE

Before considering how the courts have decided that drug testing challenges fit into the Fourth Amendment framework, a description of a typical drug testing program may be useful.

The drug testing program challenged in *Schaill By Kross* v. *Tippecanoe County School Corporation* included the following procedures. All students who wished to participate in interscholastic athletics and their parents or guardians were required to sign a consent form agreeing to submit to urinalysis if selected on a random basis. Each student-athlete was assigned a number and the number was placed in a box. The athletic director and head coach of each athletic team were authorized to draw numbers from the box for random urine tests during the athletic season.[16]

A student selected for testing by having his/her number drawn was accompanied to a bathroom by a school offi-

cial of the same sex. The student was then provided with an empty specimen bottle, allowed to enter a lavatory stall, close the door, and produce a sample. The student was not under direct visual observation while producing the sample. The water in the toilet, however, was tinted to prevent the student from substituting it for the sample. The monitor stood outside the stall to listen for normal sounds of urination and handchecked the temperature of the sample to ensure its genuineness.

The sample was then sent to a private laboratory where it was tested for the presence of controlled substances or performance-enhancing drugs using the Enzyme Multiplied Immunoassay Technique (EMIT). A sample that tested positive would be retested using the Gas Chromatography/Mass Spectrometry (GC/MS) method, which is more accurate but also more expensive.

When a sample tested positive under both methods, the student and his/her parent or guardian would be informed of the results. They could then have the remaining portion of the sample tested at a laboratory of their choice. They could also present the athletic director with evidence that there is an explanation for the positive test results, such as a student who uses legally prescribed or over-the-counter medication.

Unless there is a satisfactory explanation, the student is suspended from specified portions of the athletic season. A first positive test results in suspension from 30 percent of the athletic contests; a second positive test results in suspension from 50 percent of the contests; a third positive test results in suspension for a full calendar year. A fourth positive test results in the student being barred from all athletic competitions for the remainder of his or her high school career. No other penalties are imposed upon the student and the punishment may be decreased if the student participates in an approved drug counseling program.

Similar drug testing programs were challenged in *Brooks* v. *East Chamber Consolidated Independent School District* and *Acton* v. *Vernonia School District* (cited in footnote 13)*. In *Brooks*, all students in grades 7 through 12 who participated in any extracurricular activity had to undergo a drug test when they began participating. They were then tested at random throughout the school year at a rate of 30 students per month using random selection methods, sample production procedures, and sample testing methods similar to those used in *Schaill*. Similar penalties for positive test results were also imposed.

In *Acton*, all students who participated in the athletic program were tested at the beginning of the athletic season in which they participated and randomly each week during the season. Approximately 10 percent of the students participating in the athletics of the season were selected each week by having their names drawn from a pool of participants. Procedures for producing the sample, testing it, and the penalties for positive test results were essentially the same as in *Brooks* and *Schaill*.

* The lower court case title is *Acton* v. *Vernonia School District 47J*; when the case reached the Supreme Court, the title became *Vernonia School District 47J* v. *Acton*.

THE LEGALITY OF DRUG TESTING PROGRAMS

In determining if the drug testing programs described above are legal, the lower courts have used criteria drawn from several Supreme Court decisions upholding suspicionless searches including the most recent, *Skinner* v. *Railway Labor Executives Ass'n.* and *National Treasury Employees Union* v. *Von Raab*.[17] These criteria are: (1) Compelling Need; (2) Limited Scope/Achievable Goals; (3) Less Intrusive Alternatives; (4) Diminished Expectations of Privacy; (5) Limitations on Officials' Discretion; and (6) The Result of Positive Test Findings.

1. Compelling Need

The Seventh Circuit Court of Appeals used the compelling need criterion to uphold the drug testing program in *Schaill*. The court found that a concern for drug use by students in the district prompted a random drug test of members of the high school baseball team. There were five positive tests out of 16 samples or a 31 percent incidence of drug use. This figure was comparable to national statistics on drug use, thus indicating that the district had a drug use problem comparable to the nation as a whole. The court also found that there was evidence that drug use alters one's mood, reduces one's motor coordination, and changes one's perception of pain. Thus, the health and safety of athletes and cheerleaders is a concern closely associated with drug use. For these reasons the court found that a need could have existed in the district sufficient to justify the suspicionless drug testing program.

Similarly in *Acton*, the federal district court found that the district had demonstrated that there was sufficient drug use by students and especially by those participating in athletics. The court also found " ... evidence in the record of specific instances in which coaches have observed athletes perform poorly and unsafely while under the influence of some intoxicant." The court therefore held that the school district had demonstrated a compelling need for the drug testing program sufficient to justify suspicionless searches of individuals.

On appeal, however, the Ninth Circuit Court rejected this rationale and reversed the district court's decision. Despite calling the district's desire to prevent athletic injuries a worthy goal, the court said that "the prospect that an athlete might hurt himself or a competitor ... is not a risk of the same magnitude as an airplane or train wreck, or a gas pipeline or nuclear power plant disaster." The court concluded that while drug use is

a serious national concern it is not the type of potential disaster that could cause a finding of " ... a governmental interest compelling enough to permit suspicionless testing."

Brooks is another example of where a compelling need was found not to exist. In that case, the court said that to justify suspicionless searches of individuals, there had to be evidence that participants in extracurricular activities were much more likely to use drugs than nonparticipants or that drug use by participants interfered with the school's educational mission much more seriously than does drug use by nonparticipants. Finding no evidence that those conditions existed and that no drug-related injuries had occurred in a seven-year period either in school or in after-school activities, the court said that no compelling need existed that would justify suspicionless individual drug testing. The court stated: "The justification for the ... drug testing program in essence is that their students would be safer in everything they did if they did not use drugs or alcohol. That rationale does not meet the compelling need criteria necessary to undertake a search without reasonable suspicion."

In another recent case involving a higher education rather than a secondary education situation, a similar decision was reached. In *Derdeyn* v. *University of Colorado*, a state appeals court said that although drug abuse is a national problem, no evidence was presented to show that student athletes used drugs more than persons of similar age among the general population and there was no evidence of actual drug problems or drug related injuries among the university's athletes. The court concluded that the university " ... failed to advance a compelling need based on actual student drug related problems."[18]

Thus, in regard to the compelling need criterion, the Seventh Circuit Court accepted evidence of specific drug use problems within the school setting to justify drug testing without individualized suspicion. Other courts, including the Ninth Circuit Court, rejected that as justification for suspicionless testing. In any case, general concern for drug use not based on specific concerns within a particular school setting is probably insufficient. As the *Brooks* court said, "the intrusion on personal privacy ... cannot be justified by the global goal of prevention of substance abuse."

2. Limited Scope/Achievable Goals

Another factor that caused the *Brooks* court to declare the district's drug testing program unconstitutional was that it was not limited in scope and tailored to achieve its stated goals. The program tested all students in grades 7–12 who participated in extracurricular activities without individualized suspicion. This resulted in more than half the student body being subjected to drug tests during the first half of the school year. Had the program continued many more would have been tested because during the preceding school year, only 13 students did not participate in some extracurricular activity during the year. The court held that this across-the-board examination of large numbers of students was highly intrusive.

In addition, the *Brooks* court found that the testing program was not likely to achieve its stated goals, one of which was to prevent impaired students from taking part in an after-school activity. The court was not convinced that a test conducted at the start of the season would prevent an impaired student from participating in an event weeks or months after having taken the initial test. The court was also not convinced that another stated goal, deterrence, would be met by the program because a drug-using student could simply give up participation in an extracurricular activity and continue using drugs.

In contrast, the *Schaill* court found that the drug testing program was limited in scope directed as it was toward the athletic program only. The court said that the drug testing program was to be used to enforce rules in the athletic program that were properly concerned for the safety and health of participants. This the court held to be an achievable goal.

The federal district court in *Acton* also found the school's drug testing program limited in scope and tailored to achievable goals. The court said, "unlike the policy ... in *Brooks*, which applied random drug testing to all extra-curricular activities, the Vernonia policy is limited [to athletics]. " The court said that the school district had demonstrated that its concerns were to address student safety in athletic programs and the program was not instituted " ... to engage in a 'fishing expedition' for drug and alcohol use to carry on a moral crusade." The Ninth Circuit Court decision in *Acton* did not specifically address this criterion other than to state that the goal of preventing unnecessary athletic injuries was worthy, but the danger of athletic injuries was not of sufficient magnitude to justify the suspicionless testing program.

The lower federal courts, then, have generally upheld drug testing programs that were limited in scope and designed to achieve specific goals as opposed to general efforts to test large numbers of students in the hope that such massive testing would deter students from drug use generally.

3. Less Intrusive Alternatives

Another reason that the federal district court in *Acton* found the district's drug testing program legal was that the school's less intrusive efforts to discourage drug use had been unsuccessful. The district had tried several educational programs designed to discourage drug use, but " ... the 'subtle' approach not only failed, but seemed to cause further disruptions." Moreover, the court said that less intrusive visual "screening" methods were ineffective because while some people display outward manifestations of drug or alcohol use, others do not. Thus, the court concluded that " ... random drug urinalysis testing was ... the next logical step in a progressive at-

tempt to address the drug and alcohol problems." The Ninth Circuit Court decision in *Acton* did not specifically address this criterion. It noted that if the school's goal was to avoid athletic injuries, testing of athletes was a good way to approach the problem and included this as one of the factors that " ... weigh(s) in favor of the Policy's constitutionality."

The *Schaill* court also found that less intrusive alternatives would not serve the school's interests in detection and deterrence of drug use. The court said: "The school's interest in preserving a drug-free athletic program is substantial, and cannot be adequately furthered by less intrusive measures. ... "

Thus, the lower federal courts generally upheld suspicionless drug testing programs where schools could demonstrate that their drug use problems in the athletic program continued to exist despite other efforts, such as educational programs, to eliminate them.

4. Diminished Expectations of Privacy

The *Schaill* court found that students who voluntarily decide to participate in athletics have a diminished expectation of privacy for a variety of reasons. It cited " ... an element of 'communal undress' inherent in athletic participation ... " as well as physical examinations that are integral to almost all athletic programs. In addition, the court noted that participation in interscholastic athletics is governed by rules of the state high school athletic association that set minimum grade requirements, residency requirements, and training rules that prohibit smoking, drinking, and drug use both on and off school premises. Thus, one who chooses to participate in athletics must surrender some privacy rights in exchange for the right to participate.

The federal district court in *Acton* also cited a diminished expectation of privacy by those who choose to participate in athletics. The court said that regulations require that students undergo a physical examination prior to participation, and during participation, open locker rooms do not provide a great amount of privacy as students shower and change. The court said " ... drug testing is but one part of a substantial number of other rules and regulations governing athletes."

The Ninth Circuit Court's decision in *Acton* rejected the district court's use of this criterion to uphold the program. The court said that "training rules and grade point average requirements are not the sort of government regulation that has been found to diminish the expectation of privacy of workers in high risk industries or high security areas of the government." Moreover, the court said that the " ... contention that conditions in the school locker room reduce an athlete's expectation of privacy is similarly unavailing. Normal locker room ... activities are a far cry from having an authority watch, listen to, and gather the results of one's urination." Noting that the privacy interests of athletes are not substantially lower than those of students in general, the court concluded that "children, students, do not have to surrender their right to privacy in order to secure their right to participate in athletics."

Both the *Brooks* and *Derdeyn* courts also rejected the notion that students who choose to participate in athletics have a diminished expectation of privacy. The *Derdeyn* court said that the railway employees in *Skinner* had diminished expectations of privacy because of their participation in an industry heavily regulated to ensure safety. Similarly, the employees in *Von Raab* who wished to be promoted to positions that directly involved the interdiction of illegal drugs or required them to carry firearms had diminished privacy interests given the government's interest in public safety. The court said that drug testing student athletes, however, does not serve public safety or law enforcement interests at a level similar to the testing in *Skinner* and *Von Raab*.

In *Brooks*, the court said that the factors in *Skinner* and *Von Raab* were not analogous to factors in the school setting. The court said that school activities, on campus and off, do not carry the inherent risks associated with the enforcement duties with which Customs employees are charged or with the responsibility that railway employees have. The court concluded that " ... the school environment does not require an automatic forfeiture of ... privacy expectations, as does employment with Customs or in some administrative settings."

Thus, the courts were divided on this element. The *Schaill* court found a diminished expectation of privacy for one who chooses to participate in athletics primarily because drug testing is just one part of many other requirements for participation that also infringe upon privacy rights. The *Derdeyn* and *Brooks* courts, however, as well as the Ninth Circuit Court in *Acton*, held that public safety concerns that led to diminished privacy expectations for the employees in *Skinner* and *Von Raab* do not exist in the educational setting and therefore cannot be used to justify drug testing without individualized suspicion.

5. Limitations on Officials' Discretion

Another element that the court in *Schaill* found to be important in determining the legality of the school's drug testing program was the extent to which the discretion of the examining officials is limited by the procedures under which the search is conducted. This requirement could be met by having clearly articulated, objective criteria to select the individuals for testing to ensure that any particular search was not motivated by a desire to harass or intimidate.

In applying this analysis to the district's drug testing program, the court found that the random number procedure for selection of individuals to be tested ensured that school officials had no discretion in determining who was selected. Moreover, the use of published selection criteria en-

sured that no individual was stigmatized among his or her peers due to selection for drug testing.

The federal district court in *Acton* also found that the district's random procedures for selecting individuals for testing limited the discretion of coaches and school administrators. Similarly, the Ninth Circuit Court's *Acton* decision found that drug testing under the policy was completely random and that this clearly limited the discretion of any district officials. The court said this was one of the factors weighing in favor of the policy's constitutionality.

Thus, the lower courts held that procedures that ensure random selection of individuals for testing are an important consideration in determining the constitutionality of drug testing programs. They are necessary to limit the discretion of school officials with regard to who is selected so as to prevent anyone from being intimidated or harassed.

6. The Result of Positive Test Findings

The *Schaill* court considered another factor in determining the legality of the district's drug testing program. The court said that " ... whether or not the search is intended to discover evidence of criminal activity is of crucial importance in assessing the validity of warrantless, suspicionless searches." The court noted that the testing program applied only to participation in athletics. If one refused to submit to a test, one was prohibited only from athletic participation. Such refusal would not result in any criminal penalties, academic penalties, or suspension or expulsion from school. The court concluded that the testing program was instituted to enforce the rules of the school's athletic program and was not intended to discover evidence of unlawful activity for use in criminal prosecution. Thus, one factor that enabled the court to find the district's drug testing program legal was that the information obtained was " ... intended to be used solely for noncriminal education and rehabilitative purposes."

The federal district court in *Acton* ruled in a similar fashion. The court upheld the district's drug testing program partially because the test results were used to suspend students only from athletic participation. The results were not disclosed to criminal authorities and they could not be the basis for any school disciplinary proceedings such as suspension or expulsion. The Ninth Circuit Court's decision did not address this factor other than to note that the drug testing policy authorized administrative, not criminal, searches and implied that criminal searches would require a different test for constitutionality.

Thus, the lower courts have found that the use made of the information obtained from drug tests is an important factor in determining the legality of suspicionless testing programs. If the use of the information is narrowly focused on the athletic program and the prevention of participation by drug users, then drug testing is likely to be upheld. Use of the information to impose other school discipline, however, and/or to impose criminal penalties would likely render the testing program illegal.

VERNONIA v. *ACTON*: THE SUPREME COURT DECISION

In its decision in *Acton* the Ninth Circuit Court noted that the Seventh Circuit Court had upheld a similar drug testing program, but said it believed the Seventh Circuit had unduly minimized the privacy interests of students. The court said " ... in a nutshell, we simply do not agree with the Seventh Circuit." In November 1994 the Supreme Court granted *certiorari* in *Acton*. We now turn to a consideration of the Supreme Court's decision on the issue, which was announced in June 1995. In a 6–3 decision that coincided more clearly with the Seventh Circuit Court's decision in *Schaill* than the Ninth Circuit Court's decision in *Acton*, the majority held that the Vernonia School District's policy was constitutional.

The decision addressed most of the criteria referred to earlier in this *Memo*. In regard to the compelling need criterion, the Court noted the district court's finding that a student drug abuse problem clearly existed at the school and was especially evident among those students involved in the interscholastic athletic program. Because of the prevalence of student drug use, the Court said that the drug testing policy was a reasonable way of combating the problem. "Deterring drug use by our nation's schoolchildren is at least as important as enhancing efficient enforcement of the nation's laws against the importation of drugs ... or deterring drug use by engineers and trainmen. ... "[19]

Other criteria that the Court found were met by the program included its limited scope and the use made of the test results. The Court noted the program's limited scope stating that " ... this program is directed more narrowly to drug use by school athletes where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high." The use made of the test results also supported the reasonableness of the program. The Court said that " ... the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function ... "

Regarding the less intrusive alternative criterion, the Court rejected the contention that drug testing based on suspicion was a less intrusive way by which the goal could be achieved. The Court said that such suspicion-based testing " ... brings the risk that teachers will impose testing arbitrarily upon [a] troublesome but not drug-likely student." Moreover, the Court said it has " ... repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."

Much of the justification for the constitutionality of the drug testing program, however, was based on the Court's finding that public school students in general, and athletes in particular, " ... have a lesser expectation of privacy than members of the population generally." This diminished expectation of privacy for public school students generally results from the school's custodial responsibility for children and is exemplified by the fact that " ... public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases. ... " Stating that "legitimate privacy expectations are even less with regard to student athletes," the Court cited the communal nature of public school locker rooms, which " ... are not notable for the privacy they afford."

Moreover, the Court said that athletes " ... voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally" and cited preseason physical examinations, insurance coverage or waivers, and minimum grade point averages as examples of conditions for participation.

The Court concluded that because of this " ... decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search ... Vernonia's policy is reasonable and hence constitutional."

CONCLUSIONS AND IMPLICATIONS

Public concern about use of drugs by young people remains high and efforts to counter drug abuse through education and intervention continue. Testing of athletes as a part of this effort has been prevalent in both collegiate athletics and international competition. Highly publicized efforts, such as the recent lifetime ban imposed on Canadian sprinter Ben Johnson by track and field's governing body, the IAFF, for excessive levels of steroid-related testosterone in his urine after a recent meet, keep the issue of drug testing in the public eye.[20]

While such testing is common at the collegiate and post-collegiate levels, it is less common at the secondary school level. Drug testing of public secondary school students has raised questions of its legality under the Fourth Amendment. In 1985 the Supreme Court ruled in *New Jersey* v. *T.L.O.* that public school officials were government agents to whom the Fourth Amendment applied. Thus, the Court held that in order to search students, school officials needed to take account of the student's right to be free from unreasonable searches and seizures. Generally, the Court said that this meant that school officials did not have to obtain a warrant to search students, but did need to be able to justify the search upon a reasonable suspicion that it would turn up evidence that the student had violated or is violating either the law or the rules of the school. In practical terms this appeared to mean that students could be searched only if there was individualized suspicion of wrongdoing.

Most drug testing programs, however, implement random testing procedures whereby students are selected for testing without any individualized suspicion that they have used or are using drugs. This practice raised questions about the legality of such searches based on the *T.L.O.* principle.

In 1989 the Supreme Court ruled in two employment cases that the government's needs may sometimes outweigh the privacy rights of individuals and thus testing of individuals without suspicion of their wrongdoing is permissible. Applying this principle to secondary school drug testing programs, the lower courts used several criteria by which to determine if suspicionless drug testing of high school students is legal. These criteria were the compelling need of the school to impose the program, the goals of the program, the effectiveness of less intrusive alternatives, the nature of the students' expectations of privacy, the limitations on the discretion of school officials in selecting students for testing, and the use made of the test results.

Based upon the recent Supreme Court decision in *Vernonia School Dist. 47J* v. *Acton*, drug testing programs that can be justified as needed to meet a specific, localized drug use problem are constitutional. Deterring drug use by students is a sufficiently compelling need to override the diminished expectations of privacy of public school students.

This is particularly true if the program is narrowly drawn with regard to the student population and aimed at limited and achievable goals, e.g., a drug testing program directed at student athletes with the specific goal of reducing safety risks in competition. In addition, structuring the selection of students for testing in a random manner to limit the discretion of school officials and thus prevent harassment or intimidation and using the results of the tests only to meet the goals of the program and not for other disciplinary or criminal penalties would also meet basic requirements of a drug testing program that could be legally implemented.

NOTES

1. David C. Thompson and Robert J. Shoop, "Drug Testing of Public Employees," EDUC. L. REP., June 8, 1989, p. 869.
2. Oakley Ray and Charles Ksir, *Drugs, Society and Human Behavior,* 6th ed. (St. Louis, Mo.: Mosby, 1993), pp. 9–10.
3. National Institute on Drug Abuse, *National Household Survey on Drug Abuse: Highlights 1990.* DHHS Publication No. (ADM) 91-1789. (Washington, D.C.: U.S. Government Printing Office, 1991), p. 13.
4. Jessica Portner, "Study Showing Rise in Drug Use Called into Question," *Education Week,* October 28, 1992, p. 8.
5. "Study: More Teens Use Drugs," *St. Cloud* (Minn.) *Times,* December 12, 1994, p. 1A.

6. William E. Buckley, et al., "Estimated Prevalence of Anabolic Steroid Use Among Male High School Seniors," *Journal of the American Medical Association,* December 16, 1988, pp. 3441, 3445.
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8. Perry A. Zirkel and Kathleen M. Kilcoyne. "Drug Testing of Public School Employees or Students," EDUC. L. REP. 37. p. 1029. Citing *Education Week,* September 10, 1986, at p. 19, col. 4.
9. Lynn M. Jackson. Schools Fight Steroids' Grip on Students," *USA Today,* November 19, 1990, p. 20.
10. NCAA v. Tarkanian, 488 U.S. 179, 109 S. Ct. 454, (1988).
11. *See, e. g.,* Hill v. National Collegiate Athletic Association, 276 CAL. REP. 319, 891 P. 2d 1070 (1990); Baily v. Northeastern Univ., 403 Mass 713, 532 N.E. 2d 49 (1989).
12. Skinner v. Railway Labor Executives Ass'n. 489 U.S. 602, 109 S. Ct. 1402 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S. Ct. 1384 (1989).
13. *See* Brooks v. East Chambers Consolidated Independent School District, 730 F. Supp. 759 (S. D., Tex. 1989), Decision affirmed without published opinion, 930 F. 2d 915 (5th Cir. 1991); Acton v. Vernonia School Dist. 47J, 796 F. Supp. 1354 (D. Or. 1992), reversed 23 F. 3d 1514 (9th Cir. 1994).
14. New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733, 83 L. ED. 2d 720 (1985).
15. *Id.,* 105 S. Ct. at 743, citing U. S. v. Martinez-Fuerte, 428 U.S. 543, 560-561, 96 S. Ct. 3074, 3084 (1976).
16. Schaill By Kross v. Tippecanoe County School Corporation, 864 F. 2d 1309 (7th Cir. 1988).
17. *See also,* e.g., O'Connor v. Ortega, 480 U. S. 709, 107 S. Ct. 1492 (1987); U. S. v. Martinez-Fuerte, 428 U. S. 543, 96 S. Ct. 3074 (1976); Camara v. Municipal Court, 387 U. S. 523, 87 S. Ct. 1727 (1967); New York v. Burger, 482 U. S. 691; 107 S. Ct. 2636 (1987); Colorado v. Bertine, 479 U. S. 376, 107 S. Ct. 738 (1987).
18. Derdeyn v. University of Colorado, 832 P. 2d 1031 (Colo. App. 1991).
19. "Excerpts from U. S. Supreme Court Decision in Vernonia v. Acton," *Education Week,* July 12, 1995, p. 25.
20. "IAFF Slaps Lifetime Ban on Johnson," *Minneapolis Star Tribune,* March 6, 1993, p. 3C.

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